

Competition Advocacy in Brazil – Recent Developments¹

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Novembro / 2002

¹ The views expressed in this paper are personal and should not be attributed to the Brazilian Ministry of Finance.

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RESUMO

Nos últimos três anos, a SEAE e os demais órgãos que integram o Sistema Brasileiro de Defesa da Concorrência (SBDC), concentraram esforços para disseminar o valor da concorrência dentro do próprio governo e dentre os consumidores brasileiros de um modo geral. O papel de advocacia da concorrência desempenhado pelo SBDC abrange inúmeras iniciativas que vão desde uma campanha intensiva na mídia à participação em grupos de trabalho com diversos órgãos governamentais. Este artigo examina a importância de tais iniciativas para o desenvolvimento de uma cultura de concorrência no Brasil, onde até muito recentemente o modelo econômico baseava-se em controle de preços e substituição de importações.

ABSTRACT

During the past three years, SEAE and the other agencies of the SBDC, have concentrated efforts in disseminating the value of competition within the government and throughout the Brazilian civil society. The competition advocacy role performed by the SBDC has encompassed a variety of initiatives that ranged from an intensive campaign in the media, to participation in task forces with different governmental bodies. This article examines the importance of these initiatives for the development of a competition culture in Brazil, where, until very recently, the economic model was based on price controls and import substitution.

1. THE BRAZILIAN SYSTEM FOR COMPETITION DEFENSE

The Brazilian System for Competition Defense (SBDC) is formed by three institutions: the Administrative Council for Economic Defense (CADE) the Secretariat of Economic Law (SDE), both linked to the Ministry of Justice, and the Secretariat for Economic Monitoring (SEAE) linked to the Ministry of Finance. They perform complementary roles enforcing the Competition Law no. 8.884/94, enacted in June 1994.

Concerning mergers, acquisitions and other types of concentration acts, SEAE initiates the analysis and issues a technical report, based on the application of common Merger Guidelines developed by SEAE and SDE. In the concluding remarks of this report SEAE always makes a recommendation either: approving the operation; approving the operation under specific conditions; or blocking the operation. The case is then sent to SDE, where another technical report is issued. Most of the times, SDE's reports corroborates SEAE's analysis and offers the same recommendation; it may in some cases, even reinforce SEAE's position, whenever it is challenged by any of the firms involved in the operation. Disagreements between both Secretariats have been rare in the past and virtually inexistent in the past four years.

The third step is the final administrative decision to be issued by CADE, which has a structure and attributions that resemble an administrative tribunal. CADE's decisions can only be reviewed by the judicial courts. CADE is an independent council, administratively linked to the Ministry of Justice, and it is formed by 6 commissioners and one president, which serve two year terms, with the possibility of reappointment for a second mandate. The members of CADE are selected by the Brazilian President and have to be approved by the Senate.

Conduct cases may be initiated either by SEAE or SDE, whether by their own initiative or provoked by a third party. SDE is responsible for presiding over the case, conducting the final hearings and submitting the investigative report to CADE, with a recommendation to condemn or to absolve the accused firms. SEAE may not participate in investigations started at SDE, although in most instances in the past four years it has. In such cases, SEAE has performed complementary investigations and prepared technical reports indicating to SDE its assessment to be included in the final report to CADE. CADE takes the final administrative decision, which can only be reviewed by the Brazilian Federal Courts. If the firms are found guilty, CADE will condemn them to pay fines that will range from 1% to 30% of their individual sales.

Since 1990, in addition to the administrative prosecution carried out by the SBDC, Brazil has been prosecuting cartels criminally as well. Taking into account the harmful effects of cartels for consumers and for the economy, the government enacted Law no. 8.137, which determines cartel formation a crime, punishable with imprisonment.

2. THE LEGAL FRAMEWORK

Competition and Antitrust entered a new phase after the reforms put in practice in 1994. The Real Plan was not only a stabilization plan; it was actually a plan of reform of the Brazilian economic, social and institutional structures. Stabilization, economic opening to external competition, privatization, abandonment of price control and the creation of regulatory agencies made it possible to enforce competition rules. In June 1994, Brazil moved definitively from price

control to competition policy with the enactment of Law no. 8.884. Among the innovations introduced by the new diploma, was the control of mergers and the insertion of economics in Brazilian competition law, a field which had been reserved for lawyers since its very beginning.

The new competition law enacted in June 1994 modified the previous statute in several other ways as well: (i) it granted CADE administrative and financial autonomy; (ii) made it impossible for firms to file administrative appeals of CADE decisions, transforming CADE into the final authority on merger decisions; (iii) introduced the performance commitments for the firms; (iv) instituted the concept of dominant position in the market following the European doctrine; (v) created the definition of abusive increase of prices, as the increase of prices not justified by cost increases; and (vi) defined the role of the Ministry of Finance as responsible for submitting the economic reports on merger procedures and conduct cases.⁴

Since then, there have been other changes both in the way SEAE, SDE and CADE perform their roles, and in the law itself. In 1999, SEAE instituted Guidelines for the Economic Analysis of Mergers (Directive SEAE no. 39); and later, in 2001, these Guidelines were modified and adapted to serve both SEAE's and SDE's analysis (Joint-Directive no. 50 by SEAE and SDE). These Guidelines state, in a clear and transparent way, procedures to be followed by both secretariats when analyzing horizontal concentrations submitted to the Brazilian antitrust authorities.⁵

In 1999, two other important directives were issued: the first one granting SEAE the authority to institute fines for firms which deny, omit or delay the delivery of documents necessary for the analysis of cases (Directive SEAE no. 45); and the other one (Directive MF no. 305) enlarging the investigative power of SEAE in conduct cases.⁶

The most recent initiative of anti-cartel enforcement in Brazil focuses on the implementation of a leniency program, designed to encourage parties involved in antitrust conspiracies to cooperate with the authorities, providing them with evidence of illegal activities. In December 2000, Federal Law no. 10.149 was enacted to give the Brazilian authorities the power to grant administrative amnesty associated with full, automatic criminal immunity for conspirators cooperating with antitrust investigations.⁷ This is a particularly important instrument in a system where cartels are prosecuted both at the administrative and the criminal level.

The new statute establishes that SDE, on behalf of the Brazilian government, may sign agreements giving full amnesty or reducing by one or two-thirds the penalty applicable to individuals or corporations that have 'infringed the economic order' and that choose to collaborate with the investigations. Such 'leniency agreements', as described by the Brazilian law, can only be signed if SDE does not already have enough evidence to secure the conviction of the corporation or individual at the time the agreement is proposed. Thus, even if the antitrust

⁴ These changes were described in Lúcia Helena Salgado, *A Economia Política da Ação Antitruste* (São Paulo, Ed. Singular, 1997), pp. 175-85.

⁵ SEAE is currently preparing two additional guidelines; one for Vertical Integration and a second one for Predatory Pricing, both of them should be finished within the next two months.

⁶ For a full description of Directives no. 39, no. 45 and no. 305 see Claudio Monteiro Considera and Paulo Guilherme Corrêa, "Desenvolvimento econômico e política antitruste: razões para a adoção das portarias no. 39 e 45 da SEAE e no. 305 do Ministério da Fazenda", SEAE, Working Paper, 3, November 1999.

⁷ For a full description of the Law see Claudio Considera, Paulo Corrêa and Frederico Guanais, "Building a leniency and amnesty policy: the Brazilian experience" in *Global Competition Review, The International Journal of Competition Policy and Regulation*, London, June/July 2001, pp. 44-46.

authority is aware of the infringement of the economic order, a party may qualify for the leniency program provided the authority did not have sufficient evidence to secure a conviction.

In addition, Law no. 10.149 grants SDE the power to sign leniency agreements without prior approval by CADE, which provides participants in the leniency program with further legal certainty that once the agreement is signed the SBDC will honor it. There is no need for a recommendation of amnesty, which would be subject to a revision by CADE; nonetheless, CADE is still responsible for formally declaring the final act of the leniency agreement: the reduction of the applicable penalty imposed on the offender (which might be up to 100 per cent, i.e. full amnesty). The leniency program together with the new investigative powers also introduced by the new law, has enabled Brazilian antitrust authorities to increase the detection and successful prosecution of illegal agreements among competitors.

In October 1999, Brazil and the United States signed the Mutual Legal Assistance Treaty to facilitate cooperation among their antitrust officials. This was a significant innovation, since it was the first bilateral agreement signed in this field. In June 2002, the treaty was declared in full force and effect, through the enactment of the Decree 154. Another important development in the international arena, was the confirmation of Brazil's association with the "OECD's Recommendation Concerning Effective Action Against Hard Core Cartels", being the first observer country to do so.

Moreover, since March 2002, SEAE, SDE and CADE have been adopting a simplified review for mergers that clearly do not offer any anticompetitive risks. The "Simplified Procedure Regarding Mergers" is similar to the "Early Termination" applied by U.S. Federal Trade Commission and the Department of Justice. These procedures are currently being used in most of the simple cases, leaving additional resources available for the analysis of more complex cases.

Another innovation implemented in March 2002 by the SBDC was the "Preliminary Order", issued by CADE at the request of SEAE or SDE, on complex and potentially anticompetitive merger cases. When SEAE or SDE assess that a transaction might pose competitive risks, either agency may file a request for a Preliminary Order with CADE, to prevent the parties from completing the transaction before a final administrative decision. This was a significant improvement for the Brazilian post-merger notification system, where firms have until 15 days after the completion of the transaction to submit the case before the SBDC. SEAE has submitted five requests for preliminary orders so far, all of which were granted by CADE. CADE however, has opted not to impose restrictions on the firms, but alternatively decided to call the firms to sign agreements, where they spontaneously commit not to go through with the deal until a final decision is reached.

Currently, a working group is preparing a new structure for the Brazilian System for Competition Defense, at the request of President Fernando Henrique Cardoso. The proposed draft-bill gathers under a National Competition Agency, the two investigative and advisory institutions (SEAE and SDE), and it will be organized as an independent body associated to either the Ministry of Finance or to the Ministry of Justice. CADE will keep its administrative and financial independence and have the final authority on the subject, unless one of the parties appeals to the judicial courts. The directors of the agency will serve four-year mandates, with the possibility of reappointment for a second term; while the counselors of CADE will be appointed once for five-year mandates, instead of a two-year renewable mandate, as it is now.

At the same time an amendment of the Competition Law is being prepared, not only to adapt to the new conformation of the system, but also making it more agile and efficient with respect to investigation procedures and mergers analysis. The amendment will establish among other issues, the following noticeable innovations:

1. The firms will have to file merger notifications ex-ante and not ex-post, as it is now. This will make time an ally for the antitrust authority and not for the firms, as it is in the present system. Sometimes firms delay the submission of documents necessary for the analysis of the case, making it more difficult for the tribunal to recommend structural remedies. An examination of past decisions has shown that CADE has imposed mainly behavioral remedies and only a few structural ones.
2. There will be a clear separation between the investigative role performed by the agency, and the decision-making role, performed by CADE.
3. It establishes a new procedure for the merger-analysis, where only clearly anticompetitive cases will be argued before CADE, by the Director-General of the agency. CADE, however, will still be informed about the case through a report prepared by the Director-General, and might still decide to hear it, if its assessment differs from the Director-General's.
4. There is an important change from the perspective of the consumer as well: the Director-General will be the representative of consumer's interests during the trial. Under the current system, only the firms are allowed to defend their case before CADE.
5. As a consequence to CADE being thereafter responsible only for the cases potentially harmful to competition, it will be able to issue important decisions in a shorter period of time.
6. Similarly, the Agency will have more time to investigate illegal conducts, mainly hard core cartels, and CADE also to judge them.
7. The amendment also clarifies that the final decision regarding competition issues comes from the antitrust authorities, even those related to regulated sectors, where there are specific agencies in charge.⁸ The regulatory agencies and the National Competition Agency will have to work together in these matters.

The draft-bill is currently being finished to be sent to Congress. The preliminary project was submitted to public consultation and has received many amendments during the two years of its preparation.

3. ADMINISTRATIVE X JUDICIAL SPHERES

The three agencies that integrate the Brazilian System for Competition Defense investigate and decide antitrust cases at the administrative level, where the authorities in charge are trained professionals with the necessary expertise for the task. However, the same cannot be said with respect to the judiciary system, to where the parties can appeal from decisions issued by CADE, and where the independent criminal prosecutions take place in cartel cases.

⁸ See, Claudio M. Considera and K lvia Albuquerque, "The Relationship Between Competition Policy and Regulation in the Brazilian Economy", SEAE, Working Paper 10, August 2001.

An appeal from an administrative decision will trigger a suit that will be initiated at the first sphere of the Federal Court system, where it will be analyzed by a non-specialized judge in charge of an extremely large docket, together with proprietary disputes and a variety of other claims. The Brazilian court system allows several requests for reconsideration to the same level as well as to superior tribunals, many of which suspend the proceedings. The track, thus, to a final verdict is extremely long and in many cases can take years.

In addition, judges at the first step of the judicial ladder, are in most cases neophytes with little or no antitrust background at all. They might be stationed in small districts, away from the attention of the media, where the political influence is greater as is also the risk of corruption.

Evidently, this is not an effective model for the interface between the two spheres. Short of a complete restructuring of the system, substantial competition advocacy work will be necessary, not only to technically prepare the judges to analyze and decide antitrust issues, but foremost to educate them and rest of the judicial structure on the values of competition.

4. THE CLASH BETWEEN THE TWO SPHERES WITHIN THE BRAZILIAN SYSTEM.

In the past three years in Brazil, the clash between the administrative and the judicial spheres has been specially intense. This is the result of an increasingly proactive stance adopted by the SBDC, which has just recently started to apply significant fines and to recommend preventive measures to avoid irreparable harm to the market. All the important decisions issued by the system were followed by appeals from the parties to the courts. This is an expected reaction from the Brazilian private sector, which is unaccustomed to deal with strong competition bodies; however, it has significantly impaired antitrust enforcement in Brazil, since it is met by a judicial system which not only allows, but incentives tactics to delay the application of remedies and fines.

The three cases described below reflect this incoherence on antitrust enforcement in Brazil: on the one side there are the administrative authorities, which both recommend and apply strict antitrust remedies; and on the other, the judicial courts, where the proposed punishment is systematically postponed.

The Steel Cartel Case

In October 1999, CADE found the steel producers Usiminas, CSN and Cosipa guilty of price fixing and fined the firms in R\$51 million⁹ (which corresponded to approximately 1% of their revenues in 1996). The evidence in this case was uncontroversial, since representatives from the firms themselves and their trade associations attended a meeting at SEAE in 1997, to inform that they would simultaneously increase their prices by a specific amount at a specific date. Until 1994, meetings such as these were admissible and relatively common, due to the Ministry of Finance's attribution to administer price controls. During the meeting however, the firms were warned that under the new regime, an agreement to fix prices was illegal and that

⁹Approximately US\$16.5 million.

should they attempt to jointly raise the prices for steel, they would be prosecuted for cartel formation.

This was the first cartel condemned by CADE and to this date the firms have not yet been punished. After the administrative trial, the firms appealed from the decision to the Federal Courts, requesting that CADE's decision were vacated and the fine annulled, alleging that they had not been allowed to present their arguments before CADE previous to the application of the fine. The steel companies obtained preliminary orders suspending the payment of the fines until a final judgement in the Federal Courts is reached.

In addition, in December 2001, CADE also fined Cosipa and Usiminas on additional R\$3.5 million¹⁰ each, for having intentionally misrepresented the fact that they had taken part in the meeting at SEAE in 1997. Both firms had alleged that they had not attended the meeting and later, during the trial, through the testimony of a third party, it was uncovered that they had. The firms have also appealed and the issue will be decided by the court in charge of the first set of appeals. Meanwhile, the firms were released from paying the fine until a final decision is issued.

The White Martins Case

CADE issued in June 2002, the highest individual fine ever imposed, against the firm White Martins for abuse of its dominant position in the carbonic acid gas market. The fine totaled R\$24 million¹¹, which amounted to 5 per cent of the firm's total revenues in 1997.

The investigation was initiated in 1997, after a competitor firm, Messer Grieshem, filled a complaint against White Martins, a monopolist firm at the time. Messer Grieshem alleged that it had been foreclosed from the carbonic acid gas market, due to an exclusivity agreement that White Martins had signed with Ultrafertil, which should last for ten years. Before the agreement, Ultrafertil used to sell 60% of its production to White Martins and the remaining 40% to Messer. Since 1994, though, White Martins purchased the entire production of Ultrafertil, which was in excess of its need for the product, supposedly with the sole purpose to exclude competitors from the market.

In addition to the fine for anti-competitive behavior, CADE also condemned White Martins to pay over R\$1.1 million¹² for intentionally misrepresenting data regarding the excess capacity of one of its plants, during the previous analysis of its acquisition of the firm Liquid Carbonic.

The payment of the fine imposed by CADE will be now demanded through an administrative proceeding, after which White Martins will be considered officially in debt with the Government. The attorneys that represent the firm, however, have already warned that White Martins will appeal to the Federal Courts, where it is likely that a preliminary order will be issued suspending the payment of the fine until a final decision is reached. If that indeed happens, the intended punishment would once again be indefinitely postponed.

¹⁰ Approximately US\$3.1 million.

¹¹ Approximately US\$7.4 million.

¹² Approximately US\$362,000.

The Microsoft-TBA Case

On July 2002 SDE closed the investigation involving the Brazilian subsidiary of Microsoft Corporation and one of its retailers in Brazil, TBA Informatica (TBA). The Administrative Process was sent to CADE for a decision, with SDE's recommendation that the firms were punished for having entered an exclusivity agreement, through which Microsoft granted TBA the monopoly in the market of software sales to Brazilian Federal Government in Brasilia.

Less than two months before the end of the investigation, SDE assessed that there was enough indication that the agreement was harmful to the market, and therefore, issued a preliminary order determining specific measures to be followed by Microsoft and TBA, under the penalty of daily fine for non-compliance. The firms were requested to end the territorial restrictions in Brasilia; and Microsoft should inform its clients and the other retailers around the country that the exclusivity agreement was no longer valid. In addition, SDE determined that Microsoft should publish a press release at a large Brazilian newspaper, informing the public about the preliminary order. Microsoft first, immediately followed by TBA, filed appeals at the first instance of the Federal Court and were granted injunctions overruling the order and paralyzing SDE's analysis.

SDE subsequently appealed to the Superior Court and was successful in convincing the court that there was enough evidence that the agreement was anticompetitive. The injunctions were then overturned and most of SDE's proposed measures were confirmed, with the exception of the publication in a large newspaper, of which Microsoft was released until one of the panels of the Superior Court issues a final decision.

This is an emblematic case and it exemplifies how dangerous can be the current Brazilian model for the interface between the judicial and the administrative sphere. The purpose for SDE's preliminary order was to interrupt the harmful effects the agreement, until a decision by CADE finally prohibited it. At the stage of SDE's analysis where the order was issued, the officials in charge had already concluded the substantive part of the investigative work and assessed the need to advance a remedy before its report were concluded and CADE heard the case. This aim was close to being frustrated by a judicial order, issued by a judge with no familiarity with the case or the subject at hand, and which could, in addition, have suspended SDE's work for months before a decision at one of the panels of the Superior Court was reached.

5. ENHANCING ADVOCACY

As it was seen in Section 2, Brazil has had an antitrust law for more than 30 years, however, until 1992 this law remained unused due to an economic model based on price controls and import substitution. In 1994, the new legal framework was enacted and with that, the seed for a new competition culture was planted.

The price control system that lasted in Brazil for so many years was responsible for the strong belief shared by Brazilian consumers, that controlled prices were fair prices and, thus, better than those that result from a competitive environment. Therefore, in addition to the new law and to the new administrative structure established after 1994, substantial mobilization was and still is necessary to change these views.

During the past three years, SEAE and the other agencies of the SBDC, have concentrated efforts in disseminating the value of competition within the government and throughout the Brazilian civil society. The competition advocacy role performed by the SBDC has encompassed a variety of initiatives that ranged from an intensive campaign in the media, to participation in task forces with different governmental bodies.

A competition culture is being developed in Brazil and lately, issues related to antitrust have gained significant prominence in the media. Both the Secretary for Economic Monitoring and the President of CADE have written several articles in the largest newspapers and together with the Secretary of Economic Law, are frequently quoted by journalists in their news pieces. A study on the number of articles in the print media reporting antitrust enforcement by SEAE alone, indicates that only in the first four months of 2002 there were already more pieces in the press about the agency, than during the entire year of 2001: 66 articles were published in 2001, against 79 from January through June 2002. Although there are not yet numbers for the SBDC as a whole, it seems fair to assume that it follows the same trend.

The three agencies have also took on the routine of issuing newsletters and giving press conferences to announce important decisions on the most relevant cases. This practice has increased the knowledge of journalists on the subject and, as a consequence, the information that is passed on to the general public is significantly more accurate.

The initiative of the agencies in promoting antitrust in the media, has been followed by publications by attorneys and former competition officials, including two former commissioners from CADE that have weekly columns in important newspapers. The actual growth in importance of this topic is also reflected on the inclusion of antitrust on undergraduate courses of economics; on the emergence of several graduate courses on antitrust; and on the proliferation of thesis and graduate papers on the subject.

6. CONCLUDING REMARKS

Brazil has a long history of state intervention in the economy. The culture that predominated within Brazil until recently, followed the development theory of the post-war II, where government action was seen as fundamental to diminish the gap between underdeveloped and developed countries. In such a scenery, the signal for resource allocation was given by the government, either by directly investing or through incentives to private investment, and therefore, there was no need for a pure price mechanism to guide it. Moreover, according to the economic ideology of those times, some inflation would be necessary so that the structural changes in the resource allocation would benefit the new leading (industrial) sector of the economy. Although some inflation was necessary, it had to be controlled, so that it served the right sector and did not take an explosive path.¹³

The conclusion was obvious; there was need for price control. Furthermore, the basis for the new industrial sector was the technology imported from developed countries; this implied that a limited number of firms, with large economies of scale, had enough excess capacity to

¹³ For a comprehensive historical analysis of the antitrust policy in Brazil see Considera, Claudio and Corrêa Paulo, "The Political Economy of Antitrust Policy in Brazil – from price control to competition policy", in Barry E. Hawk, Ed. 2001 *Annual Proceedings of the Fordham University School of Law, International Antitrust Law and Policy*, NY, Juris Publishing, 2002, pp. 533-68.

supply the entire Brazilian market for each product. In such an environment there was no room for competition policy.

Therefore, although CADE has been created in 1962, until 1994 it had been performing a role different than enforcing competition. Actually, its main target had been the control of price abuses, and for that purpose it was far less efficient than the agencies that during that period were responsible for enforcing price control. Thus, with such a long history of state intervention and price control, after only eight years of competition policy in Brazil it is still too early to say that competition is a value of the Brazilian society.